Supreme Court, U. S.
FILED
APR 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Docket No. 78-1437

CALLMAN GOTTESMAN and PAUL J. PEYSER,
Petitioners,

v.

GENERAL MOTORS CORPORATION and
E. I. du PONT de NEMOURS & COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT E. I. du PONT de NEMOURS & COMPANY IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, stockholders of General Motors, having failed to establish at trial that General Motors is entitled to a money judgment or other relief against Du Pont, either for violation of the federal antitrust laws or for breach of fiduciary duty imposed by state law, are nonetheless entitled to an award of legal fees and expenses against either General Motors or Du Pont.

STATUTE INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

In June 1957, shortly after this Court held that Du Pont's ownership of stock in General Motors constituted a violation of Section 7 of the Clayton Act, *United States* v. *Du Pont & Co.*, 353 U.S. 586 (1957), petitioners brought a stockholders' derivative action charging that Du Pont had used its stockholdings in General Motors in violation of both state and federal law to injure that company in numerous commercial transactions. Trial was held in the winter of 1966-67 with respect to plaintiffs' primary claims, those pertaining to the sale of automotive fabrics and finishes used in the manufacture of passenger cars. The district court held that General Motors had suffered no damages and dismissed plaintiffs' claims relating to automotive fabrics and finishes. The Court of Appeals for the Second Circuit, following an initial remand, affirmed and this Court declined review. *See Gottesman* v. *General Motors Corp.*, 436 F.2d 1205 (2d Cir.), *cert. denied*, 403 U.S. 911 (1971).

Du Pont then moved for summary judgment on or dismissal of all remaining causes of action. Following

examination of data requested by their counsel for the purpose of testing the validity of those motions, plaintiffs reported to the district court that they had no reasonable prospect of proving that General Motors had suffered any injury and that, accordingly, it would not be in the best interest of General Motors and its stockholders to continue the litigation. After notice of hearing was mailed to General Motors shareholders, the district court on January 23, 1976, issued a judgment of dismissal with prejudice, reserving to plaintiffs the right to file within 90 days an application for award of attorneys' fees.[1]

Plaintiffs' application for award of attorneys' fees of $1,000,000 and expenses against both General Motors and Du Pont was subsequently denied by the same district judge who had been assigned to this case in 1959 and had presided at all proceedings held thereafter.[2] The Court of Appeals for the Second Circuit affirmed from the bench and denied a petition for rehearing (Pet. App.).[3]

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[1] Gottesman v. General Motors Corp., No. 77-7228 (2d Cir. 1978), Appellants' Appendix at 47a-48a [hereinafter cited as Appendix].

[2] The district court's judgment of April 6, 1970, dismissing the causes of action related to automotive fabrics and finishes had awarded costs to the defendants. At the time the district court affirmed dismissal of the remaining causes of action, there were pending respondents' motions to tax costs in the total amount of $35,691.75. Petitioners "requested the Court in its discretion" to deny costs. Appendix at 41a. The district court granted this request and declined to tax costs. Gottesman v. General Motors Corp., No. 121-251 (S.D.N.Y., Sept. 20, 1976) (order denying motion to tax costs).

[3] The opinion accordingly is without precedential effect. *See* Rules of the United States Court of Appeals for the Second Circuit Supplementing the Federal Rules of Appellate Procedure, § 0.23.

REASONS FOR DENYING THE WRIT

While the petition strongly suggests that plaintiffs' claim against Du Pont has now been abandoned (Petition at 5), Du Pont has been named and served as a respondent and no notice has been filed under Rule 21(4) indicating that relief is no longer sought from Du Pont. This Brief in Opposition is accordingly being filed to demonstrate that there is no consideration that warrants review of the decision of the courts below.

1. The decision below is plainly correct, is not in conflict with any decision of this Court or any other court, applies well-established principles to a highly particularized factual situation, and in no respect calls for exercise of this Court's supervisory power.

2. The petition makes no effort to establish any basis for a claim for attorneys' fees or expenses against Du Pont. Section 4 of the Clayton Act by its terms and every pertinent decision make clear that there is no basis for such an award.

With exceptions not applicable here[4] the United States courts have always required each litigant to bear its own attorneys' fees unless a statute explicitly provides that fees are to be borne by the losing party. *E.g., Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y.*, 421 U.S. 240 (1975); *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 126-31 (1974); *Arcambel* v. *Wiseman*, 3 U.S. (3 Dall.) 306 (1796).[5]

[4] Those exceptions allow assessment of a fee against a party who has benefitted by the litigation or as a penalty for bad faith or disobeying a court order. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y., 421 U.S. 240, 257-59 (1975).

[5] This rule was codified in the Act of February 26, 1853, 10 Stat. 161, and is now found in 28 U.S.C. §§ 1920, 1923.

The statute that applies here is Section 4 of the Clayton Act, 15 U.S.C. § 15. It creates an incentive, analogous to a contingent fee, for the prosecution of private antitrust suits, by authorizing an award of attorneys' fees when treble damages have been assessed.[6] *See Perkins* v. *Standard Oil Co.*, 399 U.S. 222, 223 (1970). No damages have been assessed and therefore Section 4 precludes the assessment of a fee against Du Pont, the successful antitrust defendant.[7]

[6] The Hart-Scott-Rodino Antitrust Improvements Act of 1976 prospectively entitles antitrust plaintiffs to recover a reasonable attorney's fee if they obtain injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. *See* [1977] 3 Trade Reg. Rep. (CCH) ¶ 9320. *Compare* Protectoseal Co. v. Barancik, 484 F.2d 585, 589 (7th Cir. 1973); Milgram v. Loew's, Inc., 192 F.2d 579, 586-87 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); Decorative Stone Co. v. Building Trades Council, 23 F.2d 426, 428 (2d Cir.), *cert. denied*, 277 U.S. 594 (1928).

[7] See Alphin v. Henson, 538 F.2d 85, 86 (4th Cir.), *cert. denied*, 429 U.S. 960 (1976); Byram Concretanks, Inc. v. Warren Concrete Prod. Co., 374 F.2d 649, 651 (3d Cir. 1967); Koratron Co. v. Lion Uniform, Inc., 409 F. Supp. 1019, 1029 (N.D. Cal. 1976). Even if recovery is secured on some, but not all of the antitrust claims advanced, "[t]he fee awarded should not include compensation for time expended upon theories of liability or overdrawn items of damage ultimately rejected by the trier of fact." Vandervelde v. Put and Call Brokers and Dealers Assn., 344 F. Supp. 157, 160 (S.D.N.Y. 1972). *Accord*, Kane v. Martin Paint Stores, Inc., 439 F. Supp. 1054, 1057 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978); FLM Collision Parts, Inc. v. Ford Motor Co., 411 F. Supp. 627, 633 (S.D.N.Y.), *modified*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); Michelman v. Clark-Schwebel Fiber Glass Corp., [1975-2] Trade Cases ¶ 60,551, at 67,414 (S.D.N.Y. 1975); Woods Exploration & Producing Co. v. Aluminum Co. of America, [1973-2] Trade Cases ¶ 74,668, at 94,926 (S.D. Tex. 1972). *See generally*, ABA Antitrust Section, Monograph No. 1, *Mergers and the Private Antitrust Suit: The Private Enforcement of Section VII of the Clayton Act—Policy and Law* 14 (1977).

3. Contrary to the basis advanced for granting the writ, this case does not present any issue regarding the proper application of *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938), or any other decision of this court. Petitioners are plaintiffs who brought a stockholders' derivative action that failed. They never secured any relief in favor of General Motors, on whose behalf they sued. Both of the lower courts agreed that the litigation conferred no benefit on General Motors. That the litigation may not have been frivolous, or that it required substantial effort by petitioners' counsel, does not justify an award of attorneys' fees.

Du Pont did not breach any fiduciary duty to General Motors. *Gottesman* v. *General Motors Corp.,* 279 F. Supp. 361, 385 (S.D.N.Y. 1967), 310 F. Supp. 1257, 1260 (S.D.N.Y. 1970), *aff'd,* 436 F.2d 1205, 1212 (2d Cir. 1971). The trial court concluded on the basis of the record that "even if Du Pont was a fiduciary, it has carried its burden and it has not violated any fiduciary duty." 279 F. Supp. at 385. This finding was expressly affirmed. *See* 436 F.2d at 1212.

Having demonstrated that no violation of a fiduciary obligation occurred, Du Pont is at worst in the position of a fiduciary who has been fully cleared of all charges of wrongdoing. Accordingly, any claim against Du Pont must rest on the wholly untenable position that any plaintiff that charges a breach of trust is entitled to receive attorneys' fees from the party charged even if the charges are determined to be baseless.[8] Any such rule would invite and reward wholly unwarranted litigation.

Not a single case allows an exception to the long-standing rule that, in a stockholders' derivative action,

[8] *See* Sierra Club v. Lynn, 502 F.2d 43, 65-66 (5th Cir. 1974), *cert. denied,* 421 U.S. 994, 422 U.S. 1049 (1975).

only success on the merits will sustain an award of attorneys' fees against the corporation on whose behalf plaintiffs have volunteered to litigate.[9]

Not even an exception to that rule would advance plaintiffs' claim against Du Pont. Plaintiffs have never purported to act on behalf of Du Pont, have conferred no conceivable benefit upon it, but rather have caused it to incur substantial expense in defending this protracted litigation, which has resulted in Du Pont's complete vindication.

[9] Indeed, success was the touchstone in the Delaware cases on which Petitioners ground their plea to this Court. Those cases fall into two groups. The first group awards fees in stockholders' actions only after the corporate defendants had acted to provide the desired relief. Iroquois Industries, Inc. v. Lewis, 318 A.2d 134 (Del. 1974), *affirming* Lewis v. Scotten Dillon Co., 306 A.2d 755 (Del. Ch. 1973) (previously withheld information disclosed and transaction abandoned); Palley v. McDonnell Co., 295 A.2d 762 (Del. Ch. 1972) (acquisition proposal changed). The other cases cited by Petitioners award fees only when a non-monetary benefit was conferred by reason of the derivative action. Chrysler Corp. v. Dann, 223 A.2d 384 (Del. 1966) (executive compensation plan changed); Saks v. Gamble, 154 A.2d 767 (Del. Ch. 1958) (previously withheld information disclosed). All of the cases, moreover, assessed fees only against the corporation on whose behalf the derivative action was brought. Those cases accordingly have no relevance to a claim for attorneys' fees against Du Pont.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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